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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER 98-0140

FOR TAX PERIOD: 1995 and 1996

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ISSUES

1. Sales and Use Tax

Authority: IC 6-2.5-1-8; IC 6-2.5-4-1; 45 IAC 1.1-1-2; 45 IAC 2.2-4-1(a); 45 IAC 2.2-4-2(a); and 45 IAC 2.2-4-2(d)

Taxpayer protests assessment of Indiana sales and use tax for tax years ending in 1995 and 1996.

STATEMENT OF FACTS

Taxpayer has permission from a University to publish annual athletic team schedule posters through sales allowed under NCAA rules. The schedule posters are imprinted with the customer's business name, sports team picture, and the season schedule. Additional relevant information will be provided below as necessary.

1. Sales and Use Tax

DISCUSSION

IC 6-2.5-2-1 imposes a sales tax "upon retail transactions made in Indiana" and requires the retail merchant to collect the tax as agent for the State. IC 6-2.5-2-1. IC 6-2.5-4-1 defines a retail merchant as one who engages in "selling at retail" and states a person "is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he: (1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC 6-2.5-4-1.

45 IAC 2.2-4-1(a) states: "Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant." 45 IAC 2.2-4-2 states:

> Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:
>
> (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
> (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
> (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
> (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Taxpayer argues it is rendering professional [advertising] services and meets the four requirements of 45 IAC 2.2-4-2 to have its transactions exempt from the sales tax. The taxpayer cites the following points to substantiate its position:

1. The taxpayer claims it provides promotional services under its licensing agreement with the university.
2. Under the terms of the agreement, the taxpayer's customers cannot sell the items at retail, cannot advertise the items are in their possession, and cannot receive any consideration for the items.
3. Taxpayer is in an occupation which primarily sells advertising service.
4. The materials used for display are incidental to the service provided.
5. The price charged for the poster is inconsequential compared to the cost of the services.
6. Taxpayer paid sales tax on the materials at the time it acquired them.
7. Taxpayer's "intent is to charge its customers for advertising space rather than for the poster-like calendar that is published. In support of this intent, [taxpayer's] invoicing refers to the customer as the 'advertiser.' As such, [taxpayer] does not 'mark-up' the cost of the calendar but clearly invoices the customer for advertising services." August 21, 1997, letter from Taxpayer's accountant, labeled "Response To Explanation of Adjustments."

The taxpayer also argues that it does not meet the definition of a retail merchant because it does "not acquire tangible personal property for resale in that the primary intent is to provide advertising services. In fact, [taxpayer] does not carry calendars-in inventory nor do they [sic] acquire calendars prior to obtaining advertising orders from customers. As such, we contend that

the transfer of calendars is incidental to the sale of advertising space." August 21, 1997, letter from Taxpayer's accountant, labeled "Response To Explanation of Adjustments," emphasis in original.

The auditor concluded the taxpayer sold schedule posters and not advertising services because the taxpayer clearly billed its customers at a unit price for a specific quantity of schedule posters at a rate of approximately $1.50 for small and $4.00 for large items. "Each customer is an individual whose logo is tailored specifically for the calendars they receive. This is not a case of an unrelated party receiving copies of the calendars with the advertisements. The advertiser is the party receiving the copies of the calendars to dispose of as they please." Audit Report, page 4. The auditor further concluded the taxpayer could not qualify as an agent of its customers based upon the provisions of 45 IAC 1.1-1-2(b)(2), which states: "The taxpayer must not have any right, title, or interest in the money or property received from the transaction. The income must pass through, actually or substantially, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal."

The auditor's position is more persuasive because the taxpayer is selling custom designed promotional materials for its customers to distribute. The "advertisements" are not seen anywhere other than at the point of the customer's distribution. Unrelated third parties are not exposed to the "advertisement" in any manner. The "advertisement services" are sold and priced per unit. The taxpayer puts great reliance on the distribution restrictions imposed on its customers, but that has little to do with determining the proper characterization of the transaction taking place between the taxpayer and its customers.

Taxpayer further argues it satisfies the "but for" test used by the court in *Chrome Deposit Corporation v. Indiana Department of State Revenue*, 557 N.E.2nd 1110, in that "'but for' the customer's intent to advertise, [taxpayer] would not have published calendars. This is supported by the fact that [taxpayer] sells the advertising space prior to publishing the calendars." August 21, 1997, letter from Taxpayer's accountant, labeled "Response To Explanation of Adjustments." However, the taxpayer sells "advertising space" on a per unit basis. One could just as easily conclude that but for its customers' desire to purchase the schedule posters, the taxpayer would not render the incidental service of printing customers' information on the schedule posters and delivering them to the customers. Such a conclusion would more accurately reflect the court's determination in *Chrome Deposit*.

FINDINGS

Taxpayer's protests is respectfully denied.

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